

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on:13.12.2019****Judgment delivered on:20.12.2019****Second Appeal No.140 of 2006**

Manohar, Son of Mahadev Rao Mulankar, Aged about 55 years, R/o. Pandritarai, C/o. Mahendra Aata Chakki, Near Saraswati Rice Mill, Raipur (CG)

---- Appellant/Plaintiff**Versus**

1. Ramauti Bai, Aged about 32 years (Now 55) years, D/o. Dhelsay, w/o. Daulal, R/o.village Beldih (Belbhata), P.C. No.130, Tahsil Abhanpur, District Raipur (CG)
2. Sushil Kumar Jain, Aged about 27 years, S/o. Shri Kiasturchand Jain, R/o. Behind Bakebihari Mandir (Choubey Chowk) Sadar Bazar, Raipur, Tahsil & District Raipur (CG)
3. State of M.P. now C.G., through Collector, Raipur

---- Respondents/Defendants

For Appellant/Plaintiff : Mr.Kishore Bhaduri, Advocate

For Res.No.2/Defendant NO.2:

Mr.B.P.Sharma, Mr.Hari Agrawal
and Ms Anuja Sharma, Advocates

For Respondent No.3/State: Mr.Ravi Kumar Bhagat, Dy.G.A

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the plaintiff is as under:-

"Whether both the Courts below are justified in holding that the plaintiff has failed to prove due attestation and execution of Will dated 14/6/89 (Ex.P/3) in his favour by testator Durga Bai by recording a finding

which is perverse to the record ?”

[For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The suit property was originally held by defendant No.1-Ramauti Bai, who sold the same to Durga Bai by registered sale deed dated 12.2.1959 and ultimately it was registered on 24.5.1969. It is the case of the plaintiff that Durga Bai got executed a Will on 14.6.1989 (Ex.P-3) in his favour in presence of two attesting witnesses i.e. Dr.Ullas (PW-2) & Tarachand (PW-4) and thereafter Durga Bai died on 1.8.1989. Subsequently in order to deprive the right of the plaintiff herein, defendant No.1 again sold the suit property to defendant No.2 on 17.5.1989 and on that basis, defendant No.2 got his name registered. In the meanwhile, on 14.6.1993 the Sub-Divisional Officer (R.), Raipur rejected the plaintiff's application for mutation and ordered to prefer a civil suit, which necessitated filing the suit for declaration of title and delivery of possession.
3. Defendants No.1 and 2 filed their joint written statement and denied the averments made in the plaint and questioned the due execution and attestation of the Will dated 14.6.1989.

4. The trial Court framed as many as ten issues and ultimately by its judgment and decree dated 17.4.2001, held that the sale deed executed by defendant No.1 in favour of Durga Bai on 24.5.1969 is *benami* transaction and ultimately dismissed the suit. On appeal being preferred by the plaintiff, the first appellate Court reversed the finding of the trial Court on issue No.1 and held that execution & attestation of the Will has not been proved in accordance with law. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

5. Mr. Kishore Bhaduri, learned counsel for the appellant/plaintiff, would submit that due execution and attestation of the Will has rightly been proved by the plaintiff by examining two attesting witnesses i.e. Dr. Ullas (PW-2) & Tarachand (PW-4), as such, the ingredients of Section 63(C) of the Indian Succession Act, 1925 have been complied with in its letter and spirit and apparent from the statements of Dr. Ullas (PW-2) & Tarachand (PW-4) and as such, the

judgment and decree of the first appellate Court holding that the Will has not been proved in accordance with law deserves to be set aside.

6. Mr.B.P.Sharma, learned counsel for respondent No.2/defendant No.2, would submit that the two Courts after due appreciation of oral and documentary evidence available on record have reached to the conclusion that due execution and attestation of the Will has not been proved by the plaintiff in accordance with law and therefore, further attestation is bad. He brought to notice of this court on the following broad facts to hold that the Will suffers from suspicious circumstance:

(i) That, at the material time, the testatrix was having one son, four daughters and two grandchildren, she was residing with her son and daughter-in-law and relation of testatrix with her natural legal heir was cordial and not bitter in any sense, therefore, there was no occasion to make the Will in favour of the plaintiff, who is neither related to the testatrix nor having any kind of relation with her.

(ii) That, the testatrix was seriously ill for past one year and was diagnosed with cancer and

was admitted in hospital and even it was admitted that she could not board a rickshaw to reach to the Court complex.

7. Mr. Sharma would further submit that the propounder of the Will has taken active participation in execution of the Will, he brought two attesting witnesses, he called the notary, he got prepared draft of will by his counsel and as such, he was complete control over the testatrix at the time of execution of the Will, therefore, it cannot be held that the Will was natural and the testatrix has executed the Will at the time when she was having a sound disposing mind. Therefore, finding recorded by two Courts below that due execution and attestation of the Will has not been proved by the plaintiff, is in accordance with law, which is neither perverse nor contrary to record.

8. The question for consideration would be, whether the Will dated 14.6.89 (Ex.P-3) has been duly executed by the testatrix in favour of the plaintiff and whether the attestation of the Will has been duly proved by the plaintiff/propounder ?

9. In the matter of H. Venkatachala Iyengar v. B.N.

Thimmajamma¹ Their Lordships of the Supreme Court have summarized the principle of law and held where

¹ AIR 1959 SC 443

the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspension by clear and satisfactory evidence.

It was observed as under:-

"21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

10. Likewise, the Supreme Court in the matter of **Madhukar D. Shende v. Tarabai Aba Shedage**² has held as under:-

"9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

11. The Supreme Court in the matter of **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.**³ has held as under:-

"33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that

2 (2002) 2 SCC 85

3 (2006) 13 SCC 433

he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende (supra) and Sridevi & Ors. v. Jayaraja Shetty & Ors. (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

34. There are several circumstances which would have been held to be described by this Court as suspicious circumstances :-

- (i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;
- (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;
- (iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

[See H. Venkatachala Iyengar (supra) and Management Committee T.K. Ghosh's Academy v. T.C. Palit & Ors. AIR 1974 SC 1495].

35. We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Court in B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148], wherein this Court has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved.

36. The proof a Will is required not as a

ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

37. We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion. [See Venkatachala Iyengar (supra)]”

12. The principle of law laid down in Niranjan Umeshchandra Joshi (supra) has been followed with approval by the Supreme Court in Bharpur Singh v. Shamsheer Singh⁴.

13. In the matter of Savithri v. Karthyayani Amma⁵ the Supreme Court has held that whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. It was observed as under:-

“17. The legal requirements in terms of the said provisions are now well- settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be

4 (2009) 3 SCC 687

5 (2007) 11 SCC 621

shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine.

21. Deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. For the said purpose, as noticed hereinbefore, the background facts should also be taken into consideration. The son was not meeting his father. He had not been attending to him. He was not even meeting the expenses for his treatment from 1959, when he lost his job till his death in 1978. The testator was living with his sister and her children. If in that situation, if he executed a Will in their favour, no exception thereto can be taken. Even then, something was left for the appellant.

22. In *Ramabai Padmakar Patil (Dead) though L.Rs. and Others v. Rukminibai Vishnu Vekhande and Others* [(2003) 8 SCC 537], the Supreme Court held :

"8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without

anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring. [See also S. Sundaresa Pai and Others v. Sumangala T. Pai (Mrs.) and Another - 2002 (1) SCC 630].

23. Strong reliance has been placed by the learned counsel on Gurdial Kaur and Others v. Kartar Kaur and Others [(1998) 4 SCC 384], wherein it was held :

"4. The law is well settled that the conscience of the court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. As in the facts and circumstances of the case, the court of appeal below did not accept the valid execution of the Will by indicating reasons and coming to a specific finding that suspicion had not been dispelled to the satisfaction of the Court and such finding of the court of appeal below has also been upheld by the High Court by the impugned judgment, we do not find any reason to interfere with such decision. This appeal, therefore, fails and is dismissed without any order as to costs."

14. The principle of law laid down in Savithri (supra) has been followed by the Supreme Court in the matter of Ramesh Verma v. Lajesh Saxena⁶.

15. Reverting to the facts of the present case in

⁶ (2017) 1 SCC 257

the light of the aforesaid legal position *qua* will, it is quite vivid that Durga Bai has executed the Will of her property in favour of the plaintiff, who is neither her relative nor in any manner associated with her and admittedly he has taken active participation in execution of the Will in his favour. His statement would clearly show that he got prepared the Will by his counsel and thereafter he brought two attesting witnesses i.e. Dr.Ullas (PW-2) and Tarachand (PW-4) and he has admitted that attesting witnesses have signed the Will at his instance. It is also admitted position on record that he called notary and at his instance notary came to get the Will notarized in his favour. It has also been brought on record that Durga Bai was seriously ill at the time of executing the Will and even she could not board a rickshaw to reach to the Court premises for executing the Will and getting it registered and therefore, notary was called at home and thereafter she is said to have executed the Will, as such, two things are absolutely clear that she was seriously unwell on the date on which the Will is said to have executed by Durga Bai in favour of the plaintiff and she was completely in control of the plaintiff, he brought two witnesses i.e. Dr.Ullas (PW-2) and

Tarachand (PW-4), notary came into place of execution of Will at the instance of the propounder/plaintiff and draft of Will was also prepared at the instance of the plaintiff. Nothing has been brought on record to show that she expressed her desire to prepare the Will in favour of the plaintiff. At the time of execution of the Will, the testatrix has one son, four daughters and two grandchildren and she was residing with her son and daughter-in-law, then as to why Durga Bai was compelled to call the plaintiff and to get the Will executed in his favour. These suspicious circumstances surrounding the execution of the Will were not removed/dispelled by the propounder/plaintiff from the mind of the court by cogent and satisfactory evidence. It appears that the plaintiff has got the Will prepared by his counsel and also brought two attesting witnesses and notary, he put signature/thumb impression of Durga Bai and got the Will executed, as such, the plaintiff has failed to remove dispel suspicious circumstance, which has been brought on record, which he was required to dispel in order to prove the Will in accordance with law. Likewise, it has also been brought on record that at the time when the Will was got executed, Durga Bai was not in a sound disposing

mind which has also been established.

- 16.** It is well settled that in case of existence of any suspicious circumstances surrounding the Will, it is the propounder of the Will who has to discharge the burden of removing such suspicion and the touchstone of such removal would depend upon the satisfaction of the conscience of the Court so as to come to a finding that the Will in question was not only executed and attested in the manner required under the law but it should also be found that the said Will was the product of the free volition of the testator who had voluntarily executed the same after knowing and understanding the contents of the Will. In the present case, admittedly Durga Bai was living jointly with his son, daughter-in-law and two grandchildren and relation of testatrix with her natural heir was cordial and not better in any sense and nothing has been brought on record to show that she was not having any relation with them and her son and daughter-in-law was not taking care of her or they are not medically taking care of Durga Bai which necessitated Durga Bai to execute the Will in favour of the plaintiff excluding her son, grandchildren etc., as such, both the Courts below have rightly held that the plaintiff has failed to prove the due

execution and attestation of the Will in his favour and also failed to remove the suspicious circumstances surrounding the execution of the Will. The said finding recorded by two Courts below is finding of fact based on evidence available on record, which is neither perverse nor contrary to record. The substantial question of law is answered in favour of the defendants and against the defendants.

17. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

18. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-